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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No._____

CASSIUS M. McDONALD, PETITIONER,

v.

**WALTER A. HUNTER, WARDEN OF THE UNITED STATES
PENITENTIARY, LEAVENWORTH, KANSAS.**

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE TENTH CIRCUIT.**

Petitioner, Cassius M. McDonald, respectfully petitions the Honorable the Supreme Court of the United States, that writ of certiorari issue to the United States Circuit Court of Appeals for the Tenth Circuit to review the judgment of said court dated February 18, 1947, reversing the District Court of the United States for the District of Kansas and ordering the return of this petitioner to the custody of the respondent Warden.

OPINIONS BELOW.

The opinion and judgment of the District Court are contained in the record (R. 16-19). Opinion of the Circuit Court of Appeals reversing the District Court dated February 18, 1947 (R. 53, 54), 159 F. 2d 861.

JURISDICTIONAL STATEMENT.

Decision of the lower court was dated February 18, 1947.

Jurisdiction exists under Section 240 of the Judicial Code as amended, Title 28, U. S. Code, Sec. 347; *Waley v. Johnston*, 316 U. S. 101, 62 S. Ct. 964, 86 L. Ed. 1302.

This case involves an important question of federal constitutional and statutory law, which has not been, but should be, settled by this court.

Petitioner had served several years of a fifteen year sentence when in 1940 he filed a habeas corpus case in the Federal Court in Kansas, and was discharged. He was out of the prison 511 days pending appeal and application for certiorari, during which time he was under bond and surveillance (R. 33, 34). His release in 1940 was by a court having jurisdiction of the person and subject matter; this jurisdiction continued pending appeal and until recommitment. The judgment was valid until reversed. Petitioner was released in custody of the law and subject to all of the restraints incident to the power and jurisdiction of the Federal Courts. The decision of the Circuit Court of Appeals is premised on the theory that a prisoner who initiates habeas corpus and obtains his release is at fault, occupies the position of a prisoner who has escaped. The effect of the holding is to burden and impair the efficiency of the writ of habeas corpus. The great writ for the protection of liberty becomes a snare and a delusion. The term of the sentence is extended by the decision of the Circuit Court of Appeals in violation of the prisoner's rights

under the Fifth Amendment. Conflict exists between this decision and the cases of *Albori v. United States*, 9 Cir., 67 F. 2d 4; *White v. Pearlman*, 10 Cir., 42 F. 2d 788; *Harris v. Lang*, 27 App. D. C. 84, Syl. 4. And, petitioner's term having commenced, the decision conflicts with *U. S. v. Murray*, 275 U. S. 347, 72 L. Ed. 309, 313, 48 S. Ct. 146. Construction of the Constitution, Art. 1, Sec. 9, Par. 2 and the Statutes, Title 28, U. S. Code 451 et seq preserving the privilege of habeas corpus is involved.

QUESTIONS PRESENTED.

Where a federal prisoner petitions for habeas corpus and the Court has jurisdiction of his person and of the action and enters an order discharging him from custody under bond pending appeal, and the order is reversed on appeal and the prisoner recommitted, Is he entitled to credit on his sentence for the period of time from date of discharge to date of recommitment?

Petitioner contends that he is entitled to such credit. That a federal sentence to a term of imprisonment which has commenced to run continues to run and cannot be prolonged or extended by the courts, and that a contrary rule takes liberty in violation of the Fifth amendment, denies equal protection of the laws, denies the constitutional and statutory remedy of habeas corpus and burdens the efficiency of said constitutional writ.

A Federal District Court's determination under Title 28, U. S. Code 461, that law and justice require that petitioner be discharged from custody, is conclusive on the facts.

Prisoner's deductions for good conduct under Title 18, U. S. Code 710, are "from the term of his sentence."

STATEMENT OF MATTER INVOLVED.

Petitioner was convicted in the Federal District Court, St. Paul, Minnesota, on an indictment charging conspiracy to kidnap, transport and hold for ransom. This conviction was upheld on appeal. *McDonald v. United States*, 89 F. 2d 128. Certiorari denied, 301 U. S. 697, and petition for rehearing denied, 302 U. S. 773. His sentence was fifteen years. Service of sentence commenced Feb. 1, 1936. On June 6, 1940, an order was entered in a habeas corpus proceeding in the Federal District Court in Kansas discharging him from custody. He gave bond (R. 17, 44), conditioned that he abide the judgment of the appellate courts. The Tenth Circuit Court of Appeals reversed. *Hudspeth v. McDonald*, 120 F. 2d 962. Mandate was stayed pending petition for certiorari. Certiorari was denied. October 30, 1941, petitioner surrendered himself and was delivered back to the custody of the Warden. Petitioner was out of the penitentiary 511 days.

On May 23, 1946, the present case was filed (R. 3-10). On the day set for the hearing, June 13, 1946, petitioner filed an amended petition (R. 10, 11) alleging that petitioner's sentence of fifteen years commenced to run February 1, 1936, and

"That under Title 18, U. S. Code 710 he is entitled to a deduction from the term of his sentence of ten days for each month, and that under Title 18, U. S. Code 713, he is entitled to be discharged at

the expiration of his term of sentence less the time so deducted."

and that a fifteen year sentence commencing February 1, 1936, with such deductions would be served on or before February 26, 1946. That petitioner had observed the rules and was entitled to the deductions.

Government's return to the amended petition (R. 12-15) recites the history of petitioner's trial and conviction and prior habeas corpus cases and that "the petitioner was at large and at liberty for a period of 511 days, for which time petitioner is not entitled to credit upon service of his sentence."

Hearing was had before the Honorable Arthur J. Mellett, United States District Judge, District of Kansas. At said hearing, petitioner and the record clerk at the penitentiary gave oral testimony and certain documentary exhibits were offered on behalf of the Respondent Warden (R. 23-49). On August 19, 1946, said District Court filed his Memorandum Opinion holding that with statutory deductions for good conduct petitioner had served his sentence and order was entered discharging him from custody (R. 16-20). The order (R. 19) provided that petitioner would be subject to "all provisions of law relating to the parole of United States prisoners", and "that execution of this order be stayed for a period of ten days from this date if in the judgment of the Board of Parole and prison authorities such period of time is requisite to effectuate his release under the statute of the United States with reference to paroled prisoners."

Judgment of the trial court gave petitioner credit upon his sentence for the 511 days he was out. It did not have the effect of giving petitioner good time deductions based upon said 511 days. There is no question involved concerning right to good time based upon the time he was out.

The government appealed to the Tenth Circuit Court of Appeals, and February 18, 1947, the opinion of that court was filed (R. 53, 54) reversing the trial court and directing petitioner's return to the custody of the Warden.

Petitioner submitted to said Circuit Court of Appeals a petition for rehearing and in the alternative for stay of mandate (R. 56-59). Filing of the petition for rehearing was denied as out of time, and stay of mandate was denied (R. 55).

REASONS FOR GRANTING THE WRIT.

This case presents important questions of practice and substance touching the writ of habeas corpus; important too for its bearing on prison administration and as pertaining to the criminal law. The Circuit Court of Appeals holds that a sentence to a term of imprisonment can be satisfied only by actual imprisonment without qualification. It fails to distinguish a decision of the Ninth Circuit, *Albori v. United States*, 67 F. 2d 4, holding that a sentence to imprisonment was satisfied without the defendant ever setting foot inside the federal penitentiary. The decision conflicts, too, with *White v. Pearlman*, 10 Cir., 42 F. 2d 788; *Harris v. Lang*, 27

App. D. C. 84; *In re Jennings*, 118 Fed. 479; *McPike v. Zerbst*, 21 F. Supp. 961. Basic premise of the decision is unsound. The premise is that a prisoner who avails himself of a constitutional remedy resulting in exercise of jurisdiction by a court and his discharge from prison, is at fault. That he occupies the status of a prisoner who has escaped. This basis for the decision is out of harmony with the origin and history of the writ, and the perpetuation of the remedy in the Federal Constitution and Statutes. The decision conflicts with Rule 45 of this court and Title 28, U. S. Code 464, providing for bail and restraint of prisoner pending review of decision discharging him.

Discharge from custody by writ of habeas corpus results through the assertion of judicial power. *Eagles v. United States*, 328 U. S. ..., 91 L. Ed. 252, 255, 67 S. Ct. 313, and cases cited therein. The petitioner is not guilty of escape, technical or otherwise. *Ex parte Eley*, 130 Pac. 821, 9 Ok. Cr. 76.

Jurisdiction of the Federal Court attached to this petitioner and he was amenable to that jurisdiction continuously from his discharge until recommitted. He was in custodia legis. This dominion of the court's jurisdiction and the dominion of bail was a continuance of the original imprisonment. *Taylor v. Taintor*, 83 U. S. 366, 21 L. Ed. 287, 290, 36 S. Ct. 242; *Sibray v. United States*, 185 F. 404; *Stallings v. Splain*, 253 U. S. 339, 343, 64 L. Ed. 940, 943. He was a party to a proceeding in court. He was subject to control of the court. Rule 45. There existed physical power to control.

The decision of the Circuit Court of Appeals extends the term of imprisonment and violates the Fifth Amendment. *Acme Poultry Corp. v. United States*, 146 F. 2d 738, (Cert. Den. 324 U. S. 860).

Petitioner having entered upon service of his sentence, courts were powerless to extend term. *United States v. Murray*, 275 U. S. 347, 72 L. Ed. 309, 313; *United States v. Benz*, 282 U. S. 304, 307, 51 S. Ct. 113, 75 L. Ed. 354.

When petitioner is credited on his sentence for the time out on the writ, he will have served a fifteen year sentence less deductions for good conduct, under 18 U. S. Code 710. This is so without crediting him with such deductions based upon the time he was out. Good conduct deductions once earned become a matter of right. *Carroll v. Squier*, 136 F. 2d 571, (Cert. Den. 320 U. S. 793).

Effect of Supreme Court Rule 45 and the Statute, Title 28, U. S. Code 461, and the other questions presented here are deserving of this Court's consideration.

WHEREFORE, petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals, Tenth Circuit, according to law, to the end that this cause be reviewed by this Court; and that the judgment of the said Tenth Circuit Court of Appeals in the said cause be reversed by this Court, and for such further relief as to this Court may seem proper.

CASSIUS M. McDONALD, Petitioner.

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